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A Beautiful Law for the Beautiful Game? Revisiting the Football Offences Act 1991

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Abstract

This article revisits the operation of the Football (Offences) Act (FOA) 1991 30 years after its enactment. FOA was introduced following recommendations of the Taylor Report 1990 as part of a raft of measures looking to balance spectator safety against the threat of football crowd disorder. Providing targeted and largely uncontroversial restrictions on football spectators, and seemingly popular with police and clubs, FOA criminalises throwing missiles, encroaching onto the pitch and engaging in indecent or ‘racialist’ chanting. It is argued here that FOA has struggled to keep pace with developments in football spectator behaviour and management, that it is increasingly used in a manner unanticipated by the legislators and that it faces new challenges in enforcement as a result of developing human rights law. The FOA may still provide a useful tool for football spectator management, but it needs substantial amendment to remain relevant to the contemporary legal and football landscape.

Keywords

Football, hooliganism, Taylor report, human rights, hate crime

Introduction

It is 30 years since the Football (Offences) Act (FOA) 1991 came into force in England and Wales, when the landscape of both football and criminal law looked very different. British football was recovering from the 1989 Hillsborough disaster and English clubs were experiencing their first season back in European competition after the five-year ban that followed the disorder and fatalities at the Heysel stadium in Brussels. Large terraces with towering perimeter fences dominated stadia, and the elite clubs played in the rarely televised Football League Division One. The Premier League, ‘police-free’ matches, all-seater stadia, free movement of players and Video Assistant Referees were yet to be conceived. The criminal law regime into which FOA slotted was also significantly different; most notably the Human

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Rights Act was still almost a decade away. This article revisits the FOA three decades on, assessing its operation under the changed legal, security, and football industry landscape. It considers whether it has achieved its original aims, its compliance with the European Convention on Human Rights (ECHR), and argues that FOA 1991 may not now be as uncontentious as previously thought. The article will analyse the legislation and its statutory context, draw upon arrest statistics reported annually by the UK Football Policing Unit (UKFPU) and make reference to the role of FOA in contemporary match policing in England and Wales.¹

Context and Purpose of the FOA

The deaths at Hillsborough resulted from a crowd crush, with perimeter fencing preventing supporters escaping the two overcapacity central Leppings Lane ‘pens’.² Perimeter fencing of this nature was common in football stadia throughout the world as a measure to prevent fans invading the pitch and engaging in violence or disorder, behaviour that had been recorded since the birth of the professional game at the end of the 19th century.³ The report into the disaster by Lord Justice Taylor recommended, *inter alia*, that perimeter fencing should be lowered, with overhanging or spiked sections removed, and clearly marked gates left open when spectators were present.⁴ Within a number of years, and with the purpose for the fencing largely defeated, perimeter fencing was gradually removed from almost all stadia in the UK. However, this recommendation removed one of the crowd control measures designed to prevent crowd disorder (or ‘hooliganism’ as it was popularly known). Taylor’s view was that, ‘Although incidents of physical violence inside grounds are now much fewer, there remains an undercurrent of unruly behaviour which can and occasionally does result in disorder’.⁵ As a result, he recommended the introduction of new criminal offences that would discourage both pitch invasions and crowd behaviour that might incite pitch invasions. Taylor’s three recommended offences appeared in the FOA and have remained on the statute book, subject to some minor amendments, since.

FOA’s explanatory note states that it is to ‘make further provision with respect to disorderly conduct by persons attending football matches; and for connected purposes’. It applies to all ‘designated football matches’, currently set out in s 1(2) The Football (Offences) (Designation of Football Matches) Order 2004, which broadly covers all matches involving men’s professional clubs and national teams across England and Wales.⁶ The three offences are considered in turn later; s 2 criminalises throwing missiles in stadiums, s 3 criminalises engaging in ‘indecent or racist’ chanting and s 4 criminalises ‘going onto the playing area’. A person guilty of any of the three offences is liable on summary conviction to a fine not exceeding level 3 on the standard scale.⁷ As with other legislation looking to confront football crowd disorder, FOA does not only criminalise actions of spectators, but instead applies to everyone ‘at a designated football match’. Absent a defence, this would mean that a football *player* on the pitch would

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1. This utilises observations from a series of interdisciplinary research projects 2017–21. The ‘Enable UK’ projects utilised a Participatory Action Research approach to evaluate football policing and was funded by HEFCE/N8PRP and the English Football League (see C Stott, G Pearson and O West, ‘Enabling an Evidence Based Approach to Policing Football in the UK’ (2019) 14(4) *Policing* 977–94).
 2. Taylor LJ, Hillsborough Disaster Final Report (Cm 962, 1990); *The Report of the Hillsborough Independent Panel* (The Stationery Office, London 2012); D McArdle, *From Boot Monday to Bosman* (Cavendish, London 2000); P Scraton, *Hillsborough: The Truth* (Mainstream, Edinburgh 2009).
 3. E Dunning, PJ Murphy and J Williams, *The Roots of Football Hooliganism* (Routledge, London 1988).
 4. See Taylor (n 2) at 77–78.
 5. Taylor (n 2) para 289.
 6. As amended by The Football (Offences) (Designation of Football Matches) (Amendment) Order 2011, s 1(2) designates matches ‘in which one or both of the participating teams represents a club which is for the time being a member (...) of the Football League, the Football Association Premier League, the Football Conference, the Scottish Football League or the Welsh Premier League, or whose home ground is for the time being situated outside England and Wales, or represents a country or territory’ and (3), ‘... an association football match in competition for the Football Association Cup ...’.
 7. Section 5(2).

be committing an offence. Although there is no suggestion that this was specifically considered at the time, the ss 2 and 4 offences contain a defence of 'lawful authority or lawful excuse' that would prevent any such conviction.⁸

The idea of football-specific offences to manage the problem of 'hooliganism' was not novel. The Sporting Events (Control of Alcohol etc.) Act 1985 introduced a number of alcohol-related offences that applied only to football, and s 40(2) Public Order Act (POA) 1986 extended this to criminalise the use of pyrotechnics. Criminalising pitch incursion had in fact been a suggested addition to the Sporting Events Bill in 1985,⁹ and the following year, the Popplewell Report into Crowd Safety and Control at Sports Grounds had recommended that 'running onto the pitch without good reason and missile throwing' should be made criminal offences.¹⁰ One reason for the lack of legislative action prior to 1991 was that throwing missiles and indecent or 'racialist' chanting could already be covered by existing offences of assault and public disorder. The latter category of offences was strengthened by the introduction of s 5 POA 1986 (Harassment Alarm or Distress), which could also capture aggressive (rather than celebratory) pitch invasions. Taylor, however, was of the view that the requirement under s 5 POA to demonstrate that the use of threatening, abusive or insulting¹¹ words or behaviour, or disorderly behaviour, was 'within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby', may be difficult to prove to the criminal standard.¹² In a similar vein, James argues that the *mens rea* requirements for the offences of assault or public disorder may often not be present in the act of missile throwing or indecent/racist chanting.¹³

These arguments tend to overstate the difficulties in achieving convictions for public order offences at football matches.¹⁴ The context of football is rarely taken into account, in a way that mitigates the effect on the defendant, when the potential impact on members of the public of POA offences is considered. Indeed, the courts have been criticised for their failure to acknowledge that behaviour, which in other contexts may cause a member of the public to feel alarmed or distressed, may not in a football stadium due to the regular use of such words or behaviour and the presence of physical and surveillance measures that ensure any threatening or disorderly behaviour cannot cause physical harm to rival fans.¹⁵ Further, 'public disorder' remains the most popular reason for arrest in a football context,¹⁶ and in the 2018/19 season, there were 220 arrests for public disorder inside stadia, nearly three times the number than were made for ss 2–3 FOA in the same period. The *mens rea* requirement for assault would be unlikely to restrict the ability to convict defendants for missile throwing, given that assault requires only recklessness on behalf of the defendant that the victim apprehends imminent unlawful force.¹⁷ Nevertheless, despite the relative ease with which common assault or s 5 POA could be used, in practical terms the FOA offences make *arrest* more likely as they do not require officers to identify either an actual or

8. Interestingly, no such defence exists in the Sporting Events (Control of Alcohol etc.) Act 1985, meaning that players celebrating title victories by shaking champagne bottles or drinking their contents are liable for offences under s 2 of that legislation.

9. Hansard [House of Lords] 11 July 1985 Vol 46 (Amendment No 14).

10. *Final Report* (Cm 9710, 1986) para 4.47.

11. 'Insulting' was removed by the Crime and Courts Act 2013.

12. Taylor (n 2) paras 294 and 296.

13. M James, *Sports Law* (3rd edn MacMillan, London 2017) 233.

14. Although the removal of 'insulting' words from s 5 Public Order Act (POA) 1986 means that s 3 Football (Offences) Act does now cover acts that no longer fall under s 5 POA.

15. See M Salter, 'Judicial Responses to Football Hooliganism' (1986) 37(3) NILQ 280, particularly with reference to *Mail v McDowell* [1980] QB 35, at 284.

16. Between 2020/11 and 2018/19, there was an average of 681 arrests a season. 'Public Disorder' is distinguished in UK Football Policing Unit arrest statistics from 'Violent Disorder' and includes ss 3, 4 and 5 Public Order Act 1986 <<https://www.gov.uk/government/statistics/football-related-arrests-and-banning-orders-england-and-wales-2018-to-2019-season>> accessed 04 April 2021.

17. *R v Venna* [1975] 3 All ER 788. Arrest for assault fall under the 'Violent Disorder' category in the UK Football Policing Unit arrest statistics.

potential victim.¹⁸ Furthermore, and perhaps more significantly, Lord Justice Taylor considered that the new offences were not only needed to punish miscreants but also needed to deter the misconduct.¹⁹

FOA 1991 has not been generally considered a controversial piece of legislation, in contrast to the critiques of the Sporting Events (Control of Alcohol etc.) Act 1985²⁰ or Football Banning Orders (FBOs) under the Football Spectators Act 1989,²¹ or the more general debates and campaigns against the impact of the Football Spectators (Seating) Order 1994.²² After a short flurry of academic attention in the years following its enactment,²³ there has been virtually no scholarly attention to FOA in nearly two decades.²⁴ There has also been a lack of attention to FOA in the higher courts; a *Westlaw* search uncovers only a single appeal on case stated at the Divisional Court.²⁵ Once bedded in, it appears that the FOA has become an unremarkable part of the regulatory furniture that surrounds professional football matches. This article argues that a combination of structural, behavioural, and legal changes (most clearly the operation of s 3 Human Rights Act 1998) have diminished the FOA's importance in reducing the risk of crowd disorder or violence in football grounds, have made it outdated in terms of both its language and the behaviour it seeks to confront, and have increased the scope of the statutory defences in a manner unforeseen by its drafters.

Section 2—Throwing of Missiles

Section 2 FOA provides the least contentious of the offences, making it an offence,

for a person at a designated football match to throw anything at or towards—(a) the playing area, or any area adjacent to the playing area to which spectators are not generally admitted, or (b) any area in which spectators or other persons are or may be present.

The rather clumsy nature of the wording of s 2 indicates the specific mischiefs and forms of disorder that the provision was designed to confront; spectators throwing missiles at players or officials and over the segregation line at opposing fans. The former misbehaviour is as old as professional football itself, the latter a more modern problem that arose following the segregation of visiting fans during the 1960s.

18. It is impossible to be sure why, but the introduction of Football (Offences) Act (FOA) coincided with an uptick in arrests in the Football League (from 4,122 in 1990/91 to 5,006 in 1991/92). However, within two years arrests had settled to their previous levels and then started falling rapidly. Unfortunately, football-related arrests were not collated—or at least reported—by offence until 1993/94. In 1993/94, there were 206 arrests for s 4 FOA (5 per cent of overall football-related arrests), 28 for s 2 (1 per cent) and 13 for s 3 (<1 per cent) (UK Football Policing Unit/Home Office Annual Arrest Statistics <<https://www.gov.uk/government/collections/football-banning-orders>> accessed 04 April 2021; The Football Offences and Disorder Bill Research Paper, House of Commons 99/41 (1999)).

19. Taylor (n 2) para 299.

20. G Pearson and A Sale, 'On the Lash: Revisiting the Effectiveness of Alcohol Controls at Football Matches' (2011) 21(1) Policing and Society 1; M Hall 'Alcohol and Football Spectators: Time for a Choice' (2018) 182 CLJ 62.

21. M James and G Pearson, 'Football Banning Orders: Analysing Their Use in Court' (2006) 70(6) JCL 509; M Hopkins 'Ten Seasons of the Football Banning Order' (2014) 24(3) Policing and Society 285; M James and G Pearson, '30 Years of Hurt: The Evolution of Civil Preventative Orders, Hybrid Law, and the Emergence of the Super-Football Banning Order' (2018) 1 PL 44; R Hester 'Assessing the UK Football Policing Unit Funding of Football Banning Orders in Times of Austerity' (2020) Policing <<https://doi.org/10.1093/police/paaa015>> accessed 07 April 2021.

22. D Rigg, 'Time to Take a Stand? The Law on All-seated Stadiums in England and Wales and the Case for Change' (2019) 18 ISLJ 210.

23. S Greenfield and G Osborn, 'When the Whites Go Marching In? Racism and Resistances in English Football' (1996) 6(2) Marq Sports L Rev 315 (drafting and enforcement of s 3); McArdle (n 2) 80–81 (general discussion); G Pearson, 'Legislating for the Football Hooligan: A Case for Reform' in S Greenfield and G Osborn (eds), *Sport and Law in Contemporary Society* (Frank Cass, London 2000) (on under-enforcement); and G Pearson, 'Legitimate Targets? The Civil Liberties of Football Fans' (1999) J Civ Lib 32 (whether Football (Offences) Act offences should be arrestable).

24. The exceptions are N Parpworth, 'The Offence of Racist Chanting at a Football Match' (2003) 167(3)1 JP 586; and James (n 13) 233–34.

25. *Director of Public Prosecutions v Stoke-on-Trent Magistrates' Court and Another* [2003] EWHC 1593 Admin.

The throwing of coins at players and across segregation fencing was a regular occurrence at some grounds in England and Wales, but in contrast to the pre-1980 situation in Scotland, the throwing of bottles and cans was less prevalent.²⁶ Section 2 aimed to punish and deter missile throwing and reduce the risk of it provoking pitch invasions that were now more possible following the reduction or removal of perimeter fencing.

Section 2 also includes the defence of ‘lawful authority or lawful excuse’, which operates on an express reverse burden of proof (‘which it shall be for him to prove’). Section 2 has not been the subject of any reported case, but the defence would mean that, for example, football players taking throw-ins, or physios throwing water bottles to thirsty players, will not be committing an offence. It would also presumably apply to fans who are given ticker tape to throw as part of a club-organised ‘tifo’ display (lawful authority) or to a fan who threw away a burning flare that landed at their feet to avoid burning or smoke inhalation (lawful excuse).

Arrests under s 2 have largely bucked the trend of falling arrests in football; in the last decade, there were on average 82 arrests a season in England and Wales, rising from 64 in 2010/11 to 113 in 2018/19.²⁷ Whether this indicates an increase in the number of offences is difficult to gauge and may instead reflect changing police tactics or priorities, or improving closed-circuit television (CCTV) technology making identification of perpetrators easier. Over this period, arrests under s 2 have made up nearly 6 per cent of all ‘football-related’ arrests collated by UKFPU. The UKFPU only reports statistics of arrest, and numbers of charges, prosecutions or convictions do not appear to be collated centrally. So, while s 2 is largely peripheral to football policing in the modern day, there is a consistent low level of offences that lead to arrest. A search of local newspapers online suggests that coins remain the missile of choice, although there have been occasional reports of the throwing of mobile phones or even cups of urine or faeces. There have also been prosecutions for throwing less harmful objects such as toilet rolls, although these may be more likely to result in a conditional discharge,²⁸ and at least one conviction for pushing (rather than ‘throwing’) an object in such a way that it fell onto fans in the tier below.²⁹ It is impossible to tell from the arrest statistics alone what, if any, impact s 2 has had on spectator behaviour.

One unruly and antisocial element of football spectator behaviour that has developed since (and unconnected to) the introduction of s 2 FOA is the practice of spectators engaging in ‘concourse parties’, where fans gather under the stand, usually at half-time, to dance, sing, and engage in ‘performative pint-throwing’.³⁰ It is unclear whether this practice would be an offence under s 2; concourses fall under ‘any area in which spectators or other persons are or may be present’, but whether throwing beer in the air is considered ‘at or towards’ the area where fans are congregating would be a matter for judicial interpretation. The author is not suggesting that s 2 needs to be amended to cover such behaviour, which ultimately breaches ticket terms and conditions and could also be a s 5 POA offence. However, this example illustrates one of the problems with the FOA that is becoming apparent; the legislation was written for a very different type of football crowd, which has evolved in a way that the FOA has not.

26. See evidence and parliamentary debates around the Criminal Justice (Scotland) Act 1980 (Sporting Events) and The Sporting Events (Control of Alcohol etc.) Bill 1985. The possession of containers that could hold alcohol in football stadia was outlawed in both jurisdictions before Football (Offences) Act’s enactment (see C Stoddart, ‘Criminal Justice (Scotland) Act 1980—Its Early Years’ (1983) 47 JCL 209 at 212).

27. Statistics from 2019/20 and 2020/21 have not been included in this article as both seasons were played behind closed doors or with dramatically reduced attendance as a result of Covid-19 regulations.

28. For example: <<https://www.echo-news.co.uk/news/10764190.fan-avoids-ban-for-throwing-toilet-roll/>> accessed 07 July 2021.

29. The defendant here pleaded guilty, denying us the opportunity to see how ‘throw’ under s 2 would be interpreted: <www.chroniclive.co.uk/news/north-east-news/manchester-united-fan-admits-throwing-10051951> accessed 07 July 2021.

30. <<https://www.independent.co.uk/sport/football/world-cup/world-cup-2018-england-pint-throwing-beer-box-park-croydon-hyde-park-celebration-videos-a8444651.html>> accessed 07 July 2021.

Section 3—Indecent or Racist Chanting

Of the three FOA offences, s 3 has required the most amendment and, at the time of writing, is part of a Law Commission consultation considering, *inter alia*, whether it should be extended or scrapped entirely. Section 3(1) introduces an offence of engaging or taking part ‘in chanting of an indecent or racist nature’. It defines ‘chanting’ as the ‘repeated uttering of any words or sounds’,³¹ and ‘of a racist nature’ includes ‘matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins’.³² Section 3 does not therefore cover shouting racist insults, nor does it cover chants denigrating the opposition from being from a particular locality (so long as they are not ‘indecent’). It has been held that ‘paki’ is a ‘racist’ term under s 3 and that the offence can be made out even when there is no one of the racial origin in question in the stadium at the time.³³ ‘Indecent’ is not defined in the Act, although it was suggested during the Bill’s progress through Parliament that it meant words or phrases that would be ‘unprintable in Hansard’.³⁴ As with s 2, there is no reported case law to assist, but applying *R v Stamford*³⁵ (a case about indecent photographs), it would be for the Magistrate to objectively determine whether particular words or phrases were indecent.

When recommending s 3, Taylor LJ was keen to remove the requirement for the prosecution to have to prove likelihood of harassment, alarm or distress on the part of those hearing the chants, or that racial hatred was likely to be stirred up. The intent or beliefs of those engaged in the chanting is therefore irrelevant:

Racist abuse of the kind chanted at football matches is probably not intended to stir up racial hatred. Nor could it readily be proved that racial hatred was likely to be stirred up. The effect of such chanting is to give cheap and ignoble amusement to those participating whilst causing offence and embarrassment to those abused and to the decent majority of fans.³⁶

Taylor was concerned with the ‘potentially disorderly consequences’³⁷ of such chanting, although this seems at odds with his description of its effects and was not supported by any evidence to suggest racist or indecent chanting led to disorder. Nevertheless, as a result of this intention, s 3 initially only made it an offence to engage in ‘the repeated uttering of any words or sounds in concert with one or more others’.³⁸ Therefore, an individual chanting alone would not commit the offence and would instead need to be pursued under s 5 POA, and then only if the chant had the potential to cause harassment, alarm or distress. Setting out the purpose and the parameters of s 3 in the House of Commons, the undersecretary of state for the Home Office explained,

It would be a mistake to criminalise a single racist or indecent remark that might not be widely audible in the ground; to do so would set the threshold for criminal behaviour too low. We wish to prevent group chanting, which is repeated and loud and may spark trouble, and if it occurs, to prosecute and punish the offenders.³⁹

31. Section 3(2)(a).

32. Section 3(2)(b). By including ‘insulting’, the *actus reus* therefore encapsulates more chants than could be covered now by s 5 Public Order Act 1986.

33. *DPP v Stoke Magistrates Court* (n 25).

34. Hansard [Lords] 09 May 1991 Vol 528 at 1268.

35. (1972) 2 QB 391.

36. Taylor (n 2) para 298.

37. Taylor (n 2) para 292.

38. Original Football (Offences) Act 1991, s 3(2)(a).

39. Hansard [Commons] 19 April 1991 Vol 189 at 733.

However, s 9 of the Football (Offences and Disorder) Act 1999 removed the requirement that chanting needed to be carried out 'in concert with one or more others', extending the offence to individual chanting. This, therefore deviated from the initial intention of Taylor LJ and Parliament. Increasingly, s 3 FOA was becoming a regulatory offence cut adrift from its rationale of reducing violence in stadiums.

Despite improvements in CCTV, and digital systems at many clubs that allow fans to anonymously report racist chanting, s 3 has proven difficult to enforce.⁴⁰ Between 2010/11 and 2018/19, the UKFPU reported an average of just 24 arrests, although this is an improvement on the early impact of the provision, when annual arrests across England and Wales only just reached double figures.⁴¹ Clubs have taken action to ban supporters they have identified involved in racist chanting,⁴² and clubs and players have made public statements to denounce racist chants.⁴³ Both approaches have coincided with particular chants disappearing from stadia. The 1990s also saw a number of proactive anti-racist campaigns and activities by clubs, governing bodies and the football equality group 'Kick It Out'.⁴⁴ There has also been significant self-policing among fans to confront or ostracise those still engaging in racist expression.⁴⁵ The bedding-in of s 3 also coincided with improvements in stadium infrastructure, stewarding and surveillance, an influx of new spectators, and the strengthening of FBOs under the Football Spectators Act 1989.⁴⁶

Amongst all this noise, isolating the deterrent impact of s 3 in terms of racist chanting is virtually impossible.⁴⁷ The overt large-scale racist chanting of the 1970s and 1980s has almost disappeared, and while chants with usually more subtle racial undertones do appear from time-to-time, in recent years these have tended to quickly die out, or be pushed away from the stadia, by a combination of club messaging and self-policing. Further, the low number of s 3 arrests does not reflect the number of 'football-related racist incidents' that have started to be recorded by clubs and police forces and collated centrally. One-hundred and fifty-two of these instances were recorded in the 2018/19 season, mirroring, at a slightly lower level, incidents of racist abuse reported to the 'Kick it Out' campaign.⁴⁸ However, this does not mean that the legislation is not working, nor even that the overall number of incidents is increasing, and many of the recorded incidents will not fall within the parameters of s 3.

40. Greenfield and Osborn argued that the under-enforcement was partially due to the role of stewards, rather than police, in identifying offences (n 23).

41. In 1993/94, there were 13 arrests, and in 1996/97 only 10. Again, charges, prosecutions and convictions are not collated, but it is likely that there were only a handful of convictions for this offence each season during the 1990s.

42. For example, in 2008, Blackpool FC banned nine fans for racist chanting during a derby against Preston. This corresponded with the disappearance of that particular long-standing chant from the fixture. Only two fans were arrested at this match and there were no reports of later charges <<http://news.bbc.co.uk/1/hi/england/lancashire/7300326.stm>> accessed 07 April 2021.

43. <<https://www.independent.co.uk/sport/football/premier-league/romelu-lukaku-chant-song-manchester-united-latest-asks-fan-stop-signing-a7965496.html>> accessed 07 April 2021.

44. See J Garland and M Rowe, *Racism and Anti-Racism in Football* (Palgrave MacMillan, London 1999); McArdle (n 2) 117–29; E Poulton, 'Tackling Antisemitism Within English Football: A Critical Analysis of Policies and Campaigns Using a Multiple Streams Approach' (2019) 12(1) Int JSPP 25.

45. G Pearson, *An Ethnography of Football Fans: Cans, Cops and Carnivals* (Manchester University Press, Manchester 2012) 162–67.

46. James and Pearson (2018) (n 21).

47. Poulton also notes how many Tottenham Hotspur fans engaged in 'linguistic reclamation' of the word 'Yid' following threats of prosecution and banning orders. Interestingly, three fans prosecuted for chanting 'Yid' in the stadium were charged with a racially aggravated Public Order Act offence, and the Crown Prosecution Service discontinued the case prior to the first hearing date on the basis that they did not think there was a realistic chance of conviction because, 'although the same words used in other contexts could in theory satisfy the criteria for "threatening, abusive or insulting," it is unlikely that a court would find that they were in the context of the three particular cases in question' (E Poulton and O Durell, 'Uses and Meanings of "Yid" in English Football Fandom: A Case Study of Tottenham Hotspur Football Club' (2014) 51(6) IRSS 715). Why s 3 Football (Offences) Act was not used is unclear.

48. House of Lords Library, 'Racism in Football' (Research Briefing 2020) <<https://lordslibrary.parliament.uk/research-briefings/lln-2020-0012/>> accessed 07 April 2021.

When we consider non-racist 'indecent' chanting, the picture of effectiveness and deterrence is clear. Indecent chants, those that abuse opponents or contain profanities, remain commonplace in football stadia in England and Wales, sung regularly and *en masse* sometimes by thousands of fans at once. Arrests, prosecutions and convictions simply do not follow indecent chanting, despite the CPS policy that, 'There will be a presumption of prosecution whenever there is sufficient evidence to bring offenders before a court on appropriate criminal charges and where an FBO is considered necessary'.⁴⁹ Under-enforcement has been a feature of the 'indecent' aspect of s 3 since its enactment,⁵⁰ to the extent that this part of the s 3 offence is almost redundant.

It is *almost* redundant, because there is one circumstance in which 'indecent' but non-racist chanting is enforced. In recent years, there have been both arrests and prosecutions where fans have been engaging in homophobic chanting at matches. Whether s 3 is applicable to homophobic chanting will depend on the nature of the chant. Homophobic chants most commonly heard at football grounds in Britain are an unpleasant mix of the graphic and the school playground, but whether the language used in them is 'indecent' varies. 'Do you take it up the arse?' would almost certainly qualify following *Stamford*. There have also been reported convictions under s 3 for chants of 'you're just a town full of queers' and arrests for 'Chelsea rent boys'.⁵¹ However, even here the definition of 'indecent' may be stretched, and s 3 would not be appropriate for a chant of 'does your boyfriend know you're here?', which is homophobic, but which the reasonable person would struggle to consider indecent. So, while there is clearly an appetite among some football policing officers to take action against homophobic chanting, regardless of whether it is provoking opposition fans, s 3 is not always the best tool for the job and the Court of Appeal could effectively close the door on its use in this context.

There are, therefore, several inter-linked problems with the contemporary operation of s 3. Fundamentally, the rationale for the offence is now unclear; the 1999 amendment moves the provision away from its original intention of reducing the supposed provocative effect of large-scale chanting upon rival supporters. However, the amended offence does not operate effectively as a method of regulating indecent or racist verbal expression. It does not criminalise individual shouting, abuse or gestures that may be just as offensive as chanting (and as likely to provoke disorder). It is unenforced (and probably unenforceable), against large-scale traditional football chants containing indecent language, and it does not criminalise chanting that is neither indecent nor racist but may provoke disorder (eg chants about the Munich or Hillsborough disasters). Further, s 3 does not currently provide a reliable way of deterring chanting that targets other characteristics covered by aggravated offences or hate crime sentencing policy. Abuse targeting religion, disability, sexuality and gender identity will only be covered if it is expressed in the form of a chant *and* is objectively indecent. In 2019, an attempt to extend s 3 to include gestures and cover sexual orientation, gender reassignment and any protected characteristics under the Equality Act 2010 failed to complete its passage through Parliament.⁵² However, in 2020, the Law Commission launched a consultation on the provision, raising the question, *inter alia*, of whether abuse based on non-racist characteristics should be included. It is difficult to see how the Commission will not recommend reform here, particularly under pressure from groups like *Kick It Out*. Section 3 FOA is flawed on many levels, and on a much more profound level than s 2, it is outdated in the context of the contemporary norms of football fandom.

49. <<https://www.cps.gov.uk/legal-guidance/football-related-offences-and-football-banning-orders>> accessed 07 April 2021.

50. Greenfield and Osborn (n 23); Pearson (2000) (n 23).

51. For example, <<https://www.thewestmorlandgazette.co.uk/news/3559849.men-guilty-of-homophobic-chanting-at-blackpool-fc-and-pne-derby/>> accessed 07 April 2021; <<https://www.theguardian.com/football/2019/dec/09/two-wolves-supporters-arrested-for-homophobic-abuse-during-brighton-draw>> accessed 07 April 2021; <<https://www.theguardian.com/football/2020/jan/02/three-arrested-for-homophobic-and-racist-abuse-at-brighton-v-chelsea>> accessed 07 April 2021.

52. The Bill would have also replaced 'racist' with 'racist'.

Section 4—Going Onto the Playing Area

Finally, we turn to s 4 FOA, which creates,

an offence for a person at a designated football match to go onto the playing area, or any area adjacent to the playing area to which spectators are not generally admitted, without lawful authority or lawful excuse (which shall be for him to prove).

Previously, pitch invasions could only be considered a criminal offence under public order legislation, where they were threatening⁵³ or disorderly and likely to cause harassment, alarm or distress.⁵⁴ Taylor was of the view that ‘running on the pitch often provokes and is a prelude to disorder’,⁵⁵ although he also suggested that the police should ‘exercise sensible discretion and judgment’ not to use the new offence against traditional pitch invasions, ‘when the game is over simply from joie de vivre or to pat players on the back’.⁵⁶ The need for this discretion did not find its way into the wording of s 4, and a post-match celebratory pitch invasion will be as much an offence as an aggressive one during play. Indeed, arrests are frequently made following celebratory encroachment by fans, although it is rare that interventions will be made following large post-match pitch invasions to celebrate titles, promotions or cup shocks. It is easier to make arrests under s 4 than for the other offences; pitch invaders are easier to identify and detain and are usually captured by security staff and handed immediately to police in the stadium. In 2018/19, there were 158 arrests, slightly down on the nine-year average of 186 per season.

Two related problems exist in the current functioning of s 4. The first arises from the development of football stadium infrastructure that resulted from the Football Spectators (Seating) Order 1994 and the post-1993 influx of satellite television money which led to clubs rebuilding old stands and, in many cases, moving stadia altogether. The rationale for s 4 was that without perimeter fencing, pitch invasions would be easier, leading to more regular provocation and confrontation. Traditional stands were built in close proximity to the pitch, usually separated only by a narrow ‘cinder track’; sometimes fans at the front of the terraces could literally reach out and touch players as they took throw-ins or corners. Sensibly, s 4 therefore criminalised not only encroaching onto the pitch but also onto the area adjacent to it. Since the era of stadium redevelopment, the size of this area has grown dramatically. Between modern stands and the pitch there is typically a low barrier, then a tarmacked area for stewards and media, followed by large, often digital, advertising hoardings, then the equivalent of the ‘cinder track’ onto which players may step when taking corners or throw-ins. The reach of s 4 has therefore expanded into areas where fans are unlikely to interfere with players or provoke rival supporters. While clubs may wish to deter fans spilling into this area, particularly during goal celebrations, it is questionable whether this should be a criminal matter rather than one dealt with by ticketing terms and conditions and stadium security.

The second problem arises from dominant norms of fan behaviour, particularly among visiting fans. When Taylor LJ recommended the move to all-seater stadia he did so based on two premises. First, that seated spectators would not be ‘jostled or moved about by swaying or surging’, or ‘be painfully bent double over a crush barrier’.⁵⁷ Secondly, Taylor believed that ‘spectators will become accustomed and educated to sitting’ and that fans would ‘come to accept and like’ seated accommodation.⁵⁸ On this second point, he was proven wrong. Although it appears that fans initially adhered to all-seater regulations, as time progressed, and opportunities to stand on terraces diminished, more fans started to persistently stand in seated areas. A 2019 report into standing at football in England and Wales found

53. Section 4 Public Order Act 1986. See *Cawley v Frost* [1976] 1 WLR 1207 for its use under the pre-1986 legislation.

54. Section 5 Public Order Act 1986.

55. Taylor (n 2) para 289.

56. *Ibid* para 301.

57. *Ibid* para 62.

58. *Ibid* para 76.

that around 10 per cent of fans (and the majority of visiting supporters) ‘persistently’ stood during matches in all-seater stadia.⁵⁹ At many clubs, persistent standing is an accepted feature of certain blocks or stands, and visiting supporters want and expect to stand for the duration of the match. Further, at some clubs, again particularly among visiting fans, this can lead to ‘migration’, whereby spectators choose to stand in locations other than the space immediately in front of their allocated seat. This can in turn lead to overcrowding and blocked radial stairways.⁶⁰ Where congestion occurs at the front of stands, the pressures and dangers that Taylor LJ thought would be removed by the all-seater stadium policy reappear. Moreover, when surges or goal celebrations occur in these areas, fans at the front may be pushed over the low barrier in front of them or may climb over it to avoid injury, thereby engaging s 4.

A defendant in this situation should be able to avail herself of the defence of ‘lawful excuse’.⁶¹ However, this raises both practical and legal problems. ‘Lawful excuse’ operates as an express reverse burden of proof, meaning that the defendant would need to prove on a balance of probabilities that this was the reason for her encroachment. In practical terms, this can be difficult. Obtaining witnesses to testify to a push, a crowd surge or a crush would require either gaining the support of stewards or police or identifying members of the crowd also caught up in the incident. Where a fan is stood with their friends, this is easier, but often they may be surrounded by strangers. An alternative way a defendant may look to prove that their presence the wrong side of the barrier was lawful is through CCTV footage. However, as with witness testimony from police and stewards, it is considerably easier for the prosecution than the defence to access this evidence. Indeed, there are many accounts of fans trying to access CCTV footage when they allege assaults by stewards, only to find that the footage has mysteriously gone missing.⁶²

Case law and academic commentary on the status of reverse burdens under Article 6 ECHR (Right to a Fair Trial) indicates that the s 4 defence may not now operate as a lawful reverse burden. Reverse burdens are increasingly common in low level, mainly regulatory offences,⁶³ but are controversial as they partially depart from the ‘golden thread’ of the criminal justice process,⁶⁴ and the presumption of innocence under Article 6(2) ECHR. Section 4 is undoubtedly a minor offence in terms of possible sentence upon conviction, making it more likely to be considered a proportionate departure from Article 6(2),⁶⁵ but this argument is less convincing when a conviction is followed by an FBO under s 14A Football Spectators Act 1989, which Lord Phillips correctly identified as imposing ‘serious restraints on freedoms that the citizen normally enjoys’.⁶⁶ In *Johnstone*, it was suggested that reverse burdens were appropriate for defendants who voluntarily enter a regulated environment (such as football stadia),⁶⁷ where they accept an associated burden ‘that they may have to account for any apparent wrongdoing in the course of that activity’.⁶⁸ However, this argument is not compelling with reference to s 4; the risk of being pushed over a barrier in a crowd surge only applies to those in the front few rows of stands, and fans often have little choice where in the stand their ticket is located. Moreover, the importance of the regulatory environment consideration appears to be reduced by *Sheldrake*, which prioritises the outcome of the trial and overall Article 6 considerations over the form of the offence.⁶⁹

59. J Welford, A Beard and A Corley, et al., *Standing at Football: A Rapid Evidence Assessment* (CFE Research, Leicester 2019).

60. *Ibid* 17.

61. ‘Lawful Authority’ would presumably include an order to evacuate a stand or an invitation from the public address system to come onto the pitch.

62. This is rarely perceived to happen when a prosecution case relies upon closed-circuit television evidence. See Pearson (n 45) 124–26, for a discussion of these issues.

63. Even in 1996 it was estimated that around 40 per cent of offences contained some departure from the presumption of innocence (A Ashworth and M Blake, ‘The Presumption of Innocence in English Criminal Law’ [1996] Crim LR 306).

64. *Woolmington v DPP* [1935] AC 462.

65. Following *Sheldrake v DPP*, A-G’s Reference (No 4 of 2002) [2005] 1 AC 264.

66. *Gough and Smith v Chief Constable of Derbyshire Constabulary* [2002] EWCA Civ 351 para 90.

67. *R v Johnstone* [2003] 1 WLR 1736, paras 52–53.

68. I Dennis, ‘Reverse Onuses and Presumption of Innocence: In Search of Principle’ [2005] Crim LR 901, 920.

69. *Sheldrake* (n 65).

The need for a defence for lawful incursion in the case of emergency was considered in the Taylor Report,⁷⁰ and s 4 was amended at Standing Committee with emergency situations in mind.⁷¹ However, there is no justification in *Hansard* for the reverse burden attached to this, nor any discussion of the risk of fans being pushed over barriers or encroaching beyond them to escape crushing. It appears that the inclusion of the reverse burden is merely to make it easier to gain a conviction rather than to respond to any particular challenge in proving the guilt of the suspect. Where the ultimate burden remains with the state, reverse burdens which fall within an offence have been supported by the European Court of Human Rights⁷² but only within 'reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.⁷³ The House of Lords in *Sheldrake* established that to be compliant with Article 6(2), reverse burdens must be proportionate, taking into account both the seriousness of the mischief and 'the opportunity given to the defendant to rebut the presumption'.⁷⁴ While 'football hooliganism' has (rightly or wrongly) long been considered a serious societal problem, it is doubtful that running on a football pitch was in itself a problem that required a deviation from the presumption of innocence, never mind the encroachment of fans into the sterile area between the stand and the advertising hoardings.

Although *Sheldrake* does not provide unequivocal guidance to Magistrates and Judges considering the human rights compliance of statutory reverse burdens, it establishes that there should be 'compelling' reasons for a reverse burden and that 'making a case easier for the prosecution to prove is not a major reason for upholding a reverse onus'.⁷⁵ The key question is whether there is a 'real risk of unfair conviction' resulting from the reverse burden.⁷⁶ This consideration should take into account how onerous the burden to prove or disprove the defence would be upon the parties⁷⁷ and the difficulties a defendant may have in proving the defence, including getting witnesses to come forward.⁷⁸ Balancing all the factors raised in the reverse burden cases, the s 4 reverse burden may be disproportionate, and where a conviction may be followed by an FBO, this argument becomes compelling. Therefore, a Judge faced with the s 4 defence should utilise s 3 Human Rights Act 1998 to read the provision down into a less onerous evidential burden instead,⁷⁹ particularly if it is likely that an FBO would follow a conviction.

Furthermore, recent developments in relation to Articles 10 and 11 ECHR (Freedom of Expression and Assembly) in protest and Covid-19 lockdown cases indicate that the courts should consider that exercising Article 10/11 rights can be lawful or reasonable excuse,⁸⁰ which extends the potential usage of the s 4 defence beyond what was originally intended. For example, fans invading the pitch to protest against the club's owners should no longer be charged. These twin human rights developments under Articles 6(2) and 10/11 ECHR ultimately change the way in which s 4 operates in practice.

Overall, therefore, while s 4 FOA was initially a sensible and proportionate response to the removal of perimeter fencing at football, it now operates to criminalise a greater amount of non-harmful fan activity. Conversely, the operation of its defence of 'lawful excuse' has also altered, despite a complete lack of

70. Taylor (n 2) para 301.

71. *Hansard*: Standing Committee C 27 March 1991.

72. *Salabiaku v France* (1988) 13 EHRR 379.

73. *Ibid* para 28.

74. *Sheldrake* (n 65) para 21.

75. A Ashworth, 'Burden of Proof' [2005] Crim LR 218 at 220.

76. *Sheldrake* (n 65) para 51.

77. *R v Clarke* [2008] EWCA Crim 893.

78. *Sheldrake* (n 65) para 51. See also D Hamer, 'The Presumption of Innocence and Reverse Burdens' (2007) 66 CLJ 142–71.

79. *Ghaidan v Godin-Mendoza* [2004] UKHL 30; Dennis (n 68).

80. *DPP v Zeigler and Others* [2019] EWHC 71 (Admin); *R (Dolan and others) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; *Kudrevičius v Lithuania* (2016) 62 EHRR 34. On-pitch protests can still be dispersed, and arrests can still be made for other offences (eg Aggravated Trespass), so long as police action is proportionate. Any police action would also need to take into account property owner rights under Article 1 Protocol 1 European Convention on Human Rights.

attention from the higher courts to the provision itself. Following a number of rulings on reverse burdens of proof, it may not now be compliant with Article 6(2) and, at the same time, has been extended to cover protests (and potentially other gatherings and modes of expression) that engage Articles 10/11 ECHR.

Conclusion

As a spectator sport, the ‘beautiful game’ has changed dramatically since the enactment of the FOA 1991. This has been mirrored by fundamental changes to the operation of criminal law in the courts resulting from the introduction of s 3 Human Rights Act 1998 and changing attitudes to ‘Hate Crime’. Combined, these developments challenge the suitability and relevance of the FOA, and in particular ss 3 and 4. The original rationale for the FOA is almost forgotten in its current usage, which is overwhelmingly to deter and punish low-level regulatory infractions. Where more serious misbehaviour occurs, other criminal offences tend to be used, most obviously under POA 1986 and aggravated offences under the Crime and Disorder Act 1998.

As a society we need to decide whether the regulation of low-level disorder and antisocial or verbally offensive behaviour at football matches should be a matter for the criminal law, police and courts. There is a strong argument that FOA 1991 has had its day and that these low-level infractions should instead be managed through ticketing terms and conditions and club surveillance systems and security personnel. In contrast to the situation at the time of the Taylor Report, clubs now have the ability (and through enhanced ticket conditions, the legal authority) to identify, eject and ban those who engage in the behaviours currently outlawed by FOA.⁸¹

Despite the merits of this argument, this article does not go as far as calling for FOA to be abolished. Fundamentally, and in contrast to laws around all-seater stadia and alcohol consumption, there appears little clamour for reform from the football authorities, clubs or the fans themselves, and, more importantly, no suggestion that FOA is counter-productive to order or safety at matches. Further, regulatory changes are almost certainly on the horizon with the expected permitting of ‘safe standing’ areas,⁸² and it is likely that a relaxation of other aspects of football crowd regulation would be resisted by the UKFPU, at least until this change has bedded in. Indeed, despite the numerous criticisms set out above, the relative simplicity of FOA still serves a purpose. For police officers, who are typically reminded of its powers at each prematch briefing, FOA is highly valuable as a set of established and easy-to-understand and apply rules.⁸³ For fans, FOA is now an embedded part of the regulation around attending live football events; it most likely performs an important deterrent function, particularly regarding pitch invasions, with s 4 often ‘advertised’ on the back of advertising hoardings. Finally, as a set of criminal offences, FOA performs a symbolic function,⁸⁴ setting out where society, rather than merely football, draws the line in terms of acceptable behaviour at matches. In short, there is a danger that scrapping the legislation would send out the wrong signal, particularly with regard to racist chanting. Whether this would cause problems in terms of changing crowd behaviour or the ability to punish and exclude transgressors is less clear.

The Act does, however, need substantial reform to acknowledge its altered role in regulating fan behaviour rather than preventing mass disorder. Section 3 requires amendment to specifically include all types of verbal expression that are classified as hate crime elsewhere in the criminal law. In particular, it

81. Clubs have even greater powers to ban fans from attending home matches; while Football Banning Orders under the Football Spectators Act 1989 s 14A apply for a maximum of 10 years, lifetime bans imposed by clubs are commonplace.

82. SGSA, ‘Safe management of standing at football—emerging findings’ (7 February 2020) <<https://sgsa.org.uk/safe-manage-ment-of-standing-at-football-emerging-findings/>> accessed 07 April 2021.

83. See W Maynard and T Read, *Policing Racially Motivated Incidents* (Police Research Group, London 1997), for an example of how officers can struggle with the complexities of public order law.

84. With specific reference to hate crime, see G Mason, ‘The Symbolic Purpose of Hate Crime Law’ (2014) 81(1) *Theor Criminol* 75.

should include homophobic abuse and abuse based on religion. This, in turn, would allow for the removal of the otherwise unenforced (and often unenforceable) 'indecent' chanting. Section 4 should be amended to apply only to actual pitch invasions, with encroachments into sterile zones dealt with instead by ticket conditions and, where appropriate, the POA. This in turn would prevent legal disputes over the nature of the reverse burden contained in its defence. Thirty years on, it is impossible to describe the FOA 1991 as a law still befitting the beautiful game. However, with careful amendment, a rejuvenated FOA, retaining and strengthening its simplicity and moral signalling value, still has a valuable role to play in the management of football spectators in England and Wales.

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